No. 15,902

IN THE

United States Court of Appeals

For the Ninth Circuit

YOICHI FUJII,
Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Civil No. 1487.

APPELLEE'S ANSWERING BRIEF.

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APPELLEE'S ANSWERING BRIEF.

Appellee agrees with Appellant's statement of pleadings and facts disclosing jurisdiction but adds the following as they relate to the motion to dismiss. The District Court had jurisdiction to decide jurisdiction.

STATEMENT OF THE CASE.

The Appellee agrees with Appellant's statement of the case as it relates to the motion for summary judgment with the reservation that Appellee agrees

with the facts stated but not with the argumentative statements found in the last paragraph of page 4 of Appellant's Brief beginning, "In other words . . ." and running to the end of the paragraph. As to the motion to dismiss the Appellee agrees with Appellant's statement of the case, except for the allegations that the District Court had jurisdiction (Br. 3).

QUESTIONS PRESENTED.

1. Did the District Court have jurisdiction in Civil No. 1487?

2. Is the granting of a motion to dismiss for failure to state a claim *res judicata* of a subsequent suit between the same parties under the same law and concerning the same facts?

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR AND DETERMINE A CLAIM FOR RELIEF UNDER 8 U.S.C. §903 AT THE TIME THE COMPLAINT WAS FILED.

This Court should examine into its jurisdiction whether such point has been raised or not.

Sutherland v. American Equitable Assurance Co. of New York, (2 Cir. 1930), 43 F. (2d) 973;

Cory Bros. & Co. v. U. S., (2 Cir. 1931), 47 F. (2d) 607;

U. S. v. King & Howe, (2 Cir. 1935), 78 F. (2d) 693;

Osburn v. U. S., (4 Cir. 1931), 50 F. (2d) 712, 713;

In Re Perlman, (7 Cir. 1934), 68 F. (2d) 729.

The Court of Appeals should satisfy itself not only of its own jurisdiction but also of that of the District Court in this claim for relief.

Mitchell v. Maurer, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934).

The question of jurisdiction was raised in the District Court by the motion to dismiss (R. 33-34). The District Court passed on this question by denying the motion to dismiss (see Supplemental Transcript of Record), although this is somewhat beclouded by the District Court's ruling on motion for summary judgment (R. 39).

The complaint herein was filed June 6, 1956 (R. 32). This was almost three and one-half years after the repeal of the Nationality Act of 1940 on December 24, 1952 (Immigration and Nationality Act, § 403(a)(42)). It was also some twenty months after the order of dismissal was filed in Civil No. 1300 (R. 15-16).

The Appellant in this action contends that the District Court has jurisdiction under the Nationality Act of 1940, 8 U.S.C. § 903, and § 405(a) of the Immigration and Nationality Act of 1952 (note to 8 U.S.C. § 1101). It is the contention of the Appellee that the District Court does not have jurisdiction to hear and determine the issues raised herein for the following reasons:

1. What the Appellant claims is saved by the savings clause is a procedural remedy and not a substantive right. If it is a procedural remedy, it is not saved by the savings clause.

Aure v. U. S., (9 Cir. 1955), 225 F. (2d) 88;
Hallowell v. Commons, 239 U.S. 506;
De La Rama Steamship Co. v. U. S., 344 U.S. 386;
Aiko Matsuo v. Dulles, 133 F. Supp. 711.

The question then to be determined is whether § 503 is a statute which sets up a right, or is one which sets up a procedural remedy. The Appellee contends that it sets up a procedural remedy. The above provision of the Nationality Act of 1940 was repealed effective December 24, 1952, by § 403(a)(42) of the 1952 Act. This complaint was filed June 6, 1956 under that repealed statute. The Appellant cannot complain that without § 503 he would be without any remedy. He must complain then that without § 503 he would not have the full judicial remedy in the District of Hawaii. § 403(a)(42) of the Immigration and Nationality Act, together with the other provisions thereof does not take away any substantive right because it simply changes the tribunal that is to hear the Appellant's particular case. This is true even though the change of tribunals is from a judicial tribunal to an administrative one.

Hallowell v. Commons, 239 U.S. 506;
Matsuo v. Dulles, 133 F. Supp. 711.

When Congress repealed § 503 it created new and different remedies, applicable to Appellant's situation.

What was then lost to Appellant under the repeal of § 503 was not a substantive right.

Further, this statute is not like that in *De La Rama Steamship Co. v. U. S.,* 344 U.S. 386. In that case, the statute had a dual nature, in that it included both the substantive rights, i.e., the right to recover under the War Risk Insurance Act of 1940, and the tribunal in which the case could be tried, i.e., in the District Court. In that case the procedural remedy and substantive rights are fused components of an expression of policy. Where Congress intends to take away jurisdiction, the remedy does not survive even as to pending suits unless expressly reserved.

Ex Parte McCardle, 7 Wallace 506;
Hallowell v. Commons, supra;
Bruner v. U. S., 343 U.S. 112.

See also *Lew Hsiang et al. v. Brownell,* (7 Cir. 1956), 234 F. (2d) 232, in which the Court in effect stated that the plaintiffs had not previously been denied rights or privileges as United States citizens prior to the expiration of the Nationality Act of 1940, and that this jurisdictional defect tainted the proceeding. Without a jurisdictional anchor in 1952, their complaint was held unavailing as a remedy, then or now.

A similar conclusion was reached in *Young Jin Teung v. Dulles,* (2 Cir. 1956), 229 F. (2d) 244.

The appellant contends that the jurisdictional issue herein has been settled in this Court by *Junso Fujii v. Dulles,* 224 F. (2d) 906 (1955), stating "where the factual situation before the Consulate was identical

with that here." (Br. 9). One vital problem has been overlooked by Appellant. The complaint herein was filed on June 6, 1956 (R. 32), after the expiration of the Nationality Act of 1940. Further, the facts before the Consulate were not the same as the District Court found after trial on the merits. "In October, 1952, plaintiff [Junso Fujii] applied at the American Consulate in Kobe, Japan, for a passport to return to the United States as a citizen thereof. Said application was denied and instead plaintiff was issued a Certificate of the Loss of Nationality of the United States on December 18, 1952, on the ground that he has lost his United States Citizenship under 8 U.S.C. 801(c), by reason of the above set forth military service." (Findings of Fact, April 13, 1956, *Junso Fujii v. Dulles,* Civil 1261, U.S.D.C. Hawaii (unreported)).

The *Fujii* case cannot be said to be on all fours with the case herein. The essential point made in the *Junso Fujii* case is as follows: "Insofar as the supplemental pleading alleges matters subsequent to the 'pleading sought to be supplemented' it should be considered as is an amendment and allowable as such under FRCP 15(c)." *Junso Fujii v. Dulles,* 224 F. (2d) 906, 907. The only question then was for the Court to consider whether § 405(a), Immigration and Nationality Act (66 Stat. 166, et seq.) continued the action pending at its effective date. The question here is whether § 503 of the Nationality Act survives for three and one-half years after its repeal to be used by one who did not exercise this procedural remedy during its lifetime. Or, more accurately, by

one who used it but did not follow through on appeal on a contested issue and is now attempting *to use it again three and one-half years after its repeal.*

II. THE DECISION IN CIVIL NO. 1300 GRANTING THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM IS RES JUDICATA AS TO THIS PRESENT SUIT.

There is no doubt that as to this individual Appellant, the ruling of the District Court was harsh. But the ruling of the District Court was no harsher than its ruling in Civil No. 1300 denying motion by Appellant to set aside the order of dismissal filed therein (R. 32). As a matter of fact, an appeal was perfected from that order (R. 48) and was subsequently dismissed in this Court by stipulation (see *Yoichi Fujii v. Dulles,* No. 15,259). In this connection, that is, as to the harshness of the rule, this Court is referred to *Ackermann v. U. S.,* 340 U.S. 193, in which the Supreme Court states at page 198, "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." If Appellee and the District Court are correct, then no amount of *a priori* reasoning will change Appellant's predicament.

A. The Order of the District Court in Civil No. 1300 (R. 15-17) Is a Dismissal for Failure to State a Claim.

The District Court's orders and rulings plainly say that the decisions made on May 26, 1954 (Br. Appendix A) and September 23, 1954 (R. 15-17) are for failure to state a claim. The record further shows that

counsel for Appellant had no objection as to the form of the order entered (R. 17).

The District Court decided that there had not been alleged an essential element in the complaint. Once the Court decided this, then obviously the Court was deciding that Appellant had failed to state a claim. Appellant's argument seems to say, the Court said this but didn't really mean it. Therefore, we can look to substance to decide whether its decision rested on jurisdictional grounds—citing *Young v. Higbee Co.,* 324 U.S. 204, 209, which stands for the age old principle that equity looks to substance rather than to form. *Mullen v. Fitz Simons, etc.,* (7 Cir. 1948), 172 F. (2d) 601, 602, which holds that where a Court dismisses for failure to state a claim, then it must be assumed that Appellees' theory of the case has been followed. The Court there being aware of Appellees' theory notes it was not based on failure to state a claim.

B. A Decision for Failure to State a Claim if Sustained Without Leave to Plead Further Results in a Judgment on the Merits.

From the facts, the dismissal in Civil No. 1300 was a dismissal for failure to state a claim. Rule 41(b) provides that this type of dismissal "operates as an adjudication upon the merits." See 2 Barron and Holtzoff, § 917. Further, a motion to dismiss for failure to state a claim raises the matter in bar and, if sustained without leave to plead further, results in a judgment on the merits. *Mullen v. Fitz Simons and Connell Dredge and Dock Co.,* (7 Cir. 1948), 172 F.

(2d) 601; *Sardo v. McGrath,* (D.C. Cir. 1952), 196 F. (2d) 20; and *Broder v. Hartford Accident & Indemnity Co.,* (D.C. D.C.), 17 Federal Rules Service, 12(b) 35, case 2. See also 1 Barron and Holtzoff, § 356, pages 642, 643.

Consequently, if there is a final judgment, as there is in Civil No. 1300, on a motion to dismiss for failure to state a claim, then it is an adjudication on the merits, unless otherwise so specified. Rule 41(b); *Mullen v. Fitz Simons and Connell Dredge and Dock Co., supra; Sardo v. McGrath, supra;* and *Billings Utility Co. v. Advisory Committee Board of Governors,* (8 Cir. 1943), 135 F. (2d) 108.

The above quoted *Billings Utility Company* case is as near to being on all fours with this case as any that have been cited to the Court. There, the main difference was that there were two different United States District Courts involved, but in the prior case the case was dismissed for failure to state a claim; and the Court held that this was a decision on the merits and *res judicata* would apply to a second suit filed between their parties or privies. The Court also stated that the usual rule as to *res judicata* applies in that not only what was litigated but what could have been litigated was foreclosed from being retried. *Billings Utility Co. v. Advisory Committee Board of Governors, supra; Western Pacific Railroad Corp. v. Western Pacific Railroad Co.,* (9 Cir.) 216 F. (2d) 513; *Hatchitt v. U. S.,* (9 Cir.), 158 F. (2d) 754; *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371; *C.I.R. v. Sunnen,* 333 U.S. 591.

In connection with whether a dismissal for failure to state a claim upon motion to dismiss is *res judicata,* the reasoning and authorities cited by the District Court are very helpful (R. 39-40).

> "Rule 41(b) of the Federal Rules of Civil Procedure cannot be strictly applied at or after trials, but in this case must be read conjunctively with Rule 12(b)(6). The Court is aware that a motion to dismiss cannot be substituted for a trial on the merits, 1 Federal Practice and Procedure (Barron and Holtzoff) 608, § 349 n. 79, but such is not our concern. 'This motion [to dismiss] has been declared on the one hand to be essentially the same as a demurrer. . . .' 1 Federal Practice and Procedure (Barron and Holtzoff) 603, § 348, n. 65; '. . . [and] performs the function formerly performed by a demurrer.' *Flanigan v. Security-First National Bank,* D.C. S.D. Cal. 1941, 41 F. Supp. 77, 79. 'A decree entered upon demurrer is no less effective as *res judicata* than a decree rendered upon proof.' *Sacks v. Stecker,* 62 F. (2d) 65, 66; *Old Dominion Copper Mining and Smelting Co. v. Lewisohn,* 202 F. 178; *Northern Pacific Ry. v. Slaight,* 202 U.S. 122, 27 S. Ct. 442, 51 L. Ed. 738, 106 A.L.R. 437; *W. E. Hedger Transp. Corporation v. Ira S. Bushey & Sons, Inc.,* E.D. N.Y. 1950, 92 F. Supp., 112, affirmed 186 F. (2d) 236."

C. A Decision on a Motitn to Dismiss for Failure to State a Claim May Result in a Judgment on the Merits.

As the District Court noted Rule 41(b) and Rule 12(b)(6) should be considered together. *"For failure of the plaintiff . . . to comply with these rules . . .* a defendant may move for dismissal of any action

against him . . . unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication on the merits." (Rule 41(b) FRCP in part).

"The dismissal of an action for failure to state a claim upon which relief can be granted usually results in a judgment on the merits." (1 Barron and Holtzoff, § 356, pages 642-643), citing *Mullen v. Fitz Simons and Connell Dredge and Dock Co.* (7 Cir. 1948), *supra.*

There is no restrictive limitation on the Court's order of dismissal in Civil No. 1300 (R. 15-17).

III. THE ORDER OF DISMISSAL IN CIVIL NO. 1300 IS A JUDGMENT ON THE MERITS AND AS SUCH IS RES JUDICATA.

It cannot be seriously contended that a dismissal for lack of jurisdiction is *res judicata* of a subsequent suit unless it falls within the special category of cases discussed in *Ripperger v. A. C. Allyn & Co.,* 37 F. Supp. 373, 374 (S.D. N.Y. 1940).

However, as discussed *supra* the decision in Civil No. 1300 is a judgment on the merits.

But an examination of the amended and supplemental complaint in Civil No. 1300 (R. 11-12) and of the complaint herein (R. 26-30), shows very little difference in the allegations except that those herein are alleged in more detail.

The ~~Appellant~~ Appellee contends that there are no extra or additional jurisdiction elements in this complaint (R. 26-30) than found in the amended and supplemental complaint in Civil No. 1300 (R. 11-12).

Ripperger v. A. C. Allyn & Co., (S.D. N.Y. 1940), 37 F. Supp. 373, 374, affirmed (2 Cir. 1940), 113 F. (2d) 332, 333, cert. denied 1941, 311 U.S. 695, 61 S. Ct. 136, stands for the very simple and understandable fact that a decision on jurisdiction is *res judicata* on a second suit based on the same jurisdictional facts. As is the case here. It is sound and compelling authority in favor of the Appellee. For the purpose of this argument, the order of dismissal in Civil No. 1300 is considered to be for lack of jurisdiction.

An Analysis of Brownell v. We Shung, 352 U.S. 180.

Again a vital issue was omitted in the discussion of the case by Appellant (Br. 29-30). The important issue was the jurisdictional effect of *different* immigration laws on a suit for review under the administrative procedures act, 60 Stat. 237, 5 U.S.C. § 1001, et seq.

The Court held that only under the Immigration and Nationality Act of 1952, this method of review was permissible. Under prior immigration law it had not been. *Heikkila v. Barber* (1953), 345 U.S. 229.

CONCLUSION.

The District Court was correct in holding that the former dismissal in Civil No. 1300 was *res judicata* upon this suit. It was incorrect in holding that it had jurisdiction to hear and determine this claim for relief (Supp. Transcript). In this connection, the judgment of the District Court should be modified to order dismissal for lack of jurisdiction. This will wipe out the ruling that the decision in Civil No. 1300 is *res judicata* and may in some measure allow what Appellant asks in footnote 15 (Br. 30).

Dated, Honolulu, T. H., this 10th day of June, 1958.

Respectfully submitted,

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